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In the Supreme Court of the United States

October Term, 1966

No. 891

CORVALLIS SAND & GRAVEL CO., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701; P. R. WAGES, CLYDE JOHNSON, and CARL REAMS, Individually and as Representatives of a Class to Which They Belong; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS and LEONARD RUNKLE, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Health and Welfare Fund; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS, LEONARD RUNKLE and WM. D. ROBERTSON, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Pension Fund,
Respondents.

EUGENE SAND & GRAVEL, INC., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701 et al,
Respondents.

WILDISH SAND & GRAVEL CO., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701 et al,
Respondents.

PETITIONERS' REPLY TO MEMORANDUM OF THE UNITED STATES

(Counsel are identified on the following page)

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HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701; P. R. WAGES, CLYDE JOHNSON and CARL REAMS, Individually and as Representatives of a Class to Which They Belong; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS and LEONARD RUNKLE, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Health and Welfare Fund; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS, LEONARD RUNKLE and WM. D. ROBERTSON, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Pension Fund,
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PETITIONERS' REPLY TO MEMORANDUM OF THE UNITED STATES

The question at this point is not whether petitioners are right or wrong, but whether the questions presented

by the petition are so important and uncertain as to justify the further attention of the Court. The brief of the Solicitor General has resolved any lingering doubts, for it demonstrates that they are both important and unsettled.

1. His brief concedes, if only by failing to claim the contrary, that the Board has no jurisdiction, "arguable" or otherwise, over the trustees. See *Marine Engineers v. Interlake S.S. Co.*, (1962) 370 US 173 at 180-184. Consequently, if petitioners' action against the trustees cannot be maintained in state court, it cannot be maintained at all.

2. It is also clear from the Solicitor General's brief that he, like petitioners, has been unable to find answers to the questions presented by the petition in the decisions of this Court. He has not cited a single case sustaining pre-emption of claims in state courts against third persons who are not subject to the Board's jurisdiction. The question of the effect of Board decisions on collateral interests and persons lying beyond the Board's jurisdiction is unresolved (*National Licorice Co. v. National Lab. Rel. Board*, (1940) 309 US 350 at 365) and cannot be disposed of by the erroneous generalization that petitioners merely seek a supplemental "remedy" for an unfair labor practice.

The extent to which national labor policy must

impinge on these collateral relationships is a problem requiring the same delicate adjustment of competing interests which has characterized recent decisions of the Court. The Solicitor General's position, if accepted, would extend pre-emption to every remote relationship affected by the Board's acts, whether or not it can operate upon the persons or the subject matter of those relationships. That approach is out of touch with the Court's decisions and the concern they evidence about the expansion of federal pre-emption over private rights and the jurisdiction of state courts. It is a far-reaching attack on the power of state courts to adjudicate claims of their citizens to property within their jurisdiction.

3. The basis of the Solicitor General's conclusion that the state court lacks jurisdiction over this action is his erroneous contention that petitioners seek a supplemental "remedy" for conduct constituting an unfair labor practice.[1] This is not so: This action concerns only the collateral consequences of the Board's decision as to third persons over whom it has no authority. The question is not whether the court should grant additional relief against the union. It is whether the Board's deci-

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[1] The Supreme Court of Oregon, like the Solicitor General, regarded the action as one to regulate the union's unlawful conduct; it disregarded the Board's decision and denied recovery, in part, because the conduct which produced that decision did not violate state law.

sion, which the state court must recognize,[2] has terminated the trustees' right to retain the funds. If the trustees sued for contributions under the annulled contracts, petitioners could surely plead the Board's decision as a defense. That defense is not pre-empted; it is the necessary consequence of the Board's decision. **This action no more seeks to remedy conduct constituting an unfair labor practice than if the Board's decision were pleaded as a defense to an action by the trustees for contributions.**

Petitioners ceased to contribute to the trusts when the trial examiner rendered his first decision, two years before the Board's final decision. They might well have done so at an earlier time. The right to the funds held by the trustees should not depend on the fortuitous circumstance that they did not stop making payments earlier.

4. The position of the Solicitor General is inconsistent. He concedes that some questions which arise by reason of Board decisions must be left to state adjudication, even as to persons before the Board (Br 7-8); but he does not want the Court to consider a case which squarely presents the issue as to persons and claims beyond the Board's jurisdiction. He concedes that the regulation

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[2] *Pittsburgh P. Glass Co. v. National Lab. Rel. Bd.*, (1941) 313 US 146 at 155 and *Carey v. Westinghouse Electric Corp.*, (1964) 375 US 261 at 272.

and liquidation of trusts is a function of the states, not the Board (Br 11-12); yet he objects to the Court's consideration of a case in which petitioners seek the return of assets paid to trustees under a contract which the Board has set aside.

In short, the Board's decision involved the rights and obligations of third persons for whom it must necessarily have important legal consequences. The Solicitor General does not claim that the Board can regulate those persons or determine those consequences, and his claim that this action is pre-empted will, if accepted, prevent anyone else from doing so, all to effectuate a jurisdiction which the Board concededly does not have.[3]

5. Finally, reference must be made to his meaningless assertion that petitioners have no "on-going involvement in the administration of the trusts" and that these funds are "not * * * distinguishable from wages (Br 15). This overlooks the essential fact that the funds are held by third persons whom neither petitioners nor their employees control. Nor are they of benefit to petitioners'

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[3] Even if the Board could require the union to reimburse petitioners, a matter which is not wholly clear, this is not the interest which petitioners seek to assert. The theoretical availability of a discretionary Board remedy for an unfair labor practice is not a basis for holding that rights otherwise available under state law are pre-empted. *Linn v. Plant Guard Workers*, supra, (1966) 383 US 53 at 66-67. Nor is it a justification for third parties to retain funds which are improperly held.

employees who do not qualify under the trust agreements. If petitioners have no "on-going involvement" with the trusts, they can only look to the courts for relief from their retention of funds received under an illegal contract. The Solicitor General's contention merely demonstrates what petitioners assert, that this action, which involves only the trusts, is collateral to the unfair labor practice of the union and is beyond the authority of the Board.

CONCLUSION

The Solicitor General does not ask the Court to deny certiorari because the issues are insubstantial, but merely to effectuate a new and aggressive claim to exclusive jurisdiction over areas where it is conceded the Board has no jurisdiction. He has addressed himself to the merits in terms which emphasize the fundamental importance of the questions before the Court. The petition for certiorari should be granted.

Respectfully submitted,

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Of Counsel

April 21, 1967